Ahearn

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mine Safety Appliances; Racal Corporation

File: B-233268.3; B-233268.4

Date: July 14, 1989

DIGEST

1. General Accounting Office will not object to agency's decision to reopen negotiations and request a second round of best and final offers where after award agency discovered that awardee's offer lacked the required written permission for use of government-furnished equipment (GFE), upon which the offer was conditioned; since use of GFE was material to the evaluation, agency properly permitted protester to furnish the permission through discussions rather than clarifications.

2. Protest that agency failed to apply commercial rental rate in calculating evaluation factor to be added to proposals requesting rent-free use of government-furnished equipment (GFE) is denied where the protester acknowledges that the GFE is special purpose equipment which a contractor can only obtain by purchase and the agency reasonably determines that there is no applicable commercial rental rate.

DECISION

Mine Safety Appliances (MSA) and Racal Corporation (Racal) protest the reopening of discussions under request for proposals (RFP) No. DAAA09-88-R-0827, issued by the U.S. Army Armament Munitions and Chemical Command, for gas mask filter canisters. MSA contends that the Army incorrectly concluded, after MSA had been awarded a contract, that the firm's proposal contained a previously overlooked material defect that required the agency to reopen negotiations with all offerors. Racal alleges that the agency abused its discretion by reopening negotiations to correct the material defect, and instead should have terminated MSA's contract and made award to Racal as the low acceptable, responsible offeror.

We deny the protests.

BACKGROUND

The solicitation sought proposals for alternate quantities of filters, with individual awards to be made on the basis of the lowest aggregate cost to the government. Alternate A, at issue here, was for an award of 60 percent of the 2,255,000 canisters being procured. The solicitation required that offerors proposing the use of government-furnished equipment (GFE) submit with their proposals written permission for its use from the contracting officer having cognizance over the property, indicate whether such use would be on a rental or a rent-free basis, and furnish a list of all GFE proposed for use on a rent-free basis. In this regard, the solicitation provided for an evaluation factor to be added to offers conditioned on the use of rent-free GFE.

Four offers were received for alternate A. After conducting discussions, the Army requested best and final offers (BAFOs) from all offerors. MSA was evaluated as submitting the low BAFO, while Racal submitted the apparent second low offer. On January 27, 1989, the agency made award to MSA as the low acceptable and responsible offeror for alternate A.

Racal protested the award to MSA (B-233268.2) on the basis that the evaluation of MSA's proposed use of GFE was improper. Upon subsequent review, the agency determined that MSA had failed to supply the required written permission for GFE use prior to award, a deficiency it had not raised during discussions. The agency concluded that this defect could affect contract price, and thus was material and could not be waived. To remedy the situation, the Army reopened negotiations and requested a new round of BAFOs. Our Office thereupon dismissed Racal's initial protest as academic.

Subsequently, however, MSA protested to our Office, complaining that negotiations should not have been reopened because award to it had been proper, and that the permission letter could have been furnished pursuant to an informal clarification. Racal also refiled its protest, adding the complaint that MSA's failure to furnish the required written permission for use of GFE required the rejection of MSA's proposal. The agency now informs us that it has completed evaluation of the revised BAFOs and that Racal has been determined to be the low-priced, responsible offeror; the agency intends to make award to Racal after termination of MSA's previously awarded contract.

MSA's PROTEST

MSA primarily argues that the requirement for written permission to use GFE was not a material requirement that would affect price or the firm's obligation under the contract, but rather was a minor informality that could have been corrected by post-award clarification without prejudice to other offerors. We disagree.

When the information requested from and provided by an offeror is essential for evaluation purposes, the agency is conducting discussions. See Corporate America Research Assocs., Inc., B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160. Discussions are to be distinguished from a request for clarification, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. See Federal Acquisition Regulation § 15.601. Once post-BAFO discussions are conducted with one offeror, they must be conducted with all offerors in the competitive range. Corporate America Research Assocs., Inc., B-228579, supra.

Our Office has previously recognized that the use of government property in contract performance may materially affect contract price. See 45 Comp. Gen. 572 (1966); Duro-Life Corp., B-214031, June 18, 1984, 84-1 CPD ¶ 636. Here, MSA's offer was conditioned on the use of government property in the firm's possession. Since the RFP provided for an evaluation factor to be added to offers conditioned on the rent-free use of government property, the failure of MSA to establish that it was actually authorized to use the GFE made it impossible to determine MSA's evaluated price. See id. Indeed, the fact that the proposal was conditioned on use of GFE suggests that the validity of the proposal turned on permission to use GFE. As the GFE proposed by MSA was a material factor in determining its price for evaluation purposes, we think the Army reasonably concluded that the required written permission for its use, which was a matter of administrative discretion, was essential to the evaluation of its offer and therefore could not be viewed merely as a matter of form and not substance. Accordingly, the agency properly reopened discussions rather than permit MSA to provide the written permission through clarifications. See, generally, Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD ¶ 195.

MSA contends that the agency's historical practice has been to accept written permission for use of GFE after award, and that this shows that GFE authorization has been considered a non-material term. While this authorization might not be material in certain circumstances, it clearly was material

here since it had a direct bearing on the evaluation of MSA's price. It is well-established that an agency's application of correct procedures in a procurement cannot be challenged based upon its contrary past practice. See General Electric Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

The protester argues that de facto authorization for use of the equipment was provided when the contracting officer signed the contract. We disagree. The RFP required written permission of the contracting officer having cognizance over the GFE. Although MSA had requested that cognizance over the proposed GFE here be transferred from the agency's Edgewood, Maryland, facility to its Rock Island, Illinois, facility, out of which this procurement was conducted, the transfer had not occurred at the time of award, and the contracting officer at Rock Island who signed the contract with MSA did not have the authority to permit MSA to use the equipment.

MSA's protest is denied.

RACAL's PROTEST

Racal argues that reopening negotiations was not in the best interests of the government and instead constituted coaching of the awardee in the form of prohibited technical leveling. The protester agrees with the agency that, because written permission for use of GFE was not submitted with MSA's offer, the award to MSA was improper. However, Racal contends that the proper remedy was to exclude MSA from consideration for award once the deficiency was discovered, and instead make award to Racal on the basis of its initial BAFO as the low, acceptable and responsible offeror. Further, Racal maintains that the agency improperly calculated the GFE factor added to MSA's offer for use of rent-free equipment and that if the proper evaluation factor had been applied, Racal would have been the low evaluated offeror. (Racal's initial BAFO price was higher than its second BAFO price, and Racal argues that it would have received the award based on the higher price had the Army initially added the proper GFE factor to MSA's price and not improperly reopened negotiations to correct MSA's proposal.)

We have previously held that in a negotiated procurement the lack of the required written permission for use of GFE does not require immediate rejection as in a sealed bid procurement, but rather is a proper matter for discussions. Self-Powered Lighting, Ltd., 59 Comp. Gen. 298, supra. Here, the record indicates that the Army never discussed

this deficiency in MSA's proposal.1/ In any case, a contracting officer may reopen negotiations by requesting new BAFOs where it clearly is in the government's interest to do so. FAR § 15.611(c); National Technologies Assocs., Inc., et al., B-229831.2 et al., May 13, 1988, 88-1 CPD ¶ 453. Since MSA's price was evaluated as low, it did not appear to the agency that rejection of MSA's proposal without discussions would ensure the lowest possible price to the government. In these circumstances, the agency properly reopened negotiations with both offerors.

Further, notwithstanding Racal's claim to the contrary, the Army acted reasonably in calculating the evaluation factor to be applied to proposals requesting the rent-free use of GFE. The solicitation generally provided for an evaluation factor amounting to not less than the prevailing commercial rental rate or, in the absence of such rate, a rental rate of not less than 1 percent per month for equipment of the type requested by MSA. The agency found that a commercial rental rate did not exist and instead applied a monthly rate of 1 percent. Racal argues that a commercial rental rate of 6.44 percent per month, based upon generic, commercial rates for sale-leaseback transactions, should have been applied. As the Army points out, however, Racal's proposed rate, in effect, amortizes the cost of the GFE over the 17-month production period under the new contract and appears to bear little relation to ascertaining a reasonable rental rate. In this regard, we consider it significant that Racal implicitly acknowledges that the GFE is special purpose equipment not available on a rental basis from manufacturers and which instead must be purchased by contractors not furnished the equipment by the government. Since the Army

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1/ While Racal contends that meaningful discussions did in fact occur between MSA and the Army during several telephone conversations concerning the age of the GFE proposed for use by MSA, the agency reports that the conversations occurred only after award. In any event, conversations concerning the age of the GFE cannot reasonably be considered notice that MSA had not supplied the required written permission for use of the GFE.

reasonably determined that a commercial rental rate does not exist, we find no basis to object to the agency's application of a 1 percent rental rate.

Racal's protest is denied.

James F. Hinchman
General Counsel